



### ISSUES

Claimant asserts Judge Hursh erred by finding only her adhesive capsulitis compensable. She contends her bilateral rotator cuff tendinopathy also arose out of and in the course of her employment. Claimant alleges Judge Hursh erred by failing to order medical treatment. Claimant questions whether Judge Hursh decided the issues before him. Claimant argues Judge Hursh should have found her left shoulder injury to be the direct and natural result of her right shoulder injury. Further, claimant suggests Judge Hursh erred by finding her medical treatment was unauthorized, instead of finding respondent was aware of a work-related injury and refused or neglected to provide medical treatment. Claimant requests Judge Hursh's order be remanded "for a complete Order" regarding "bilateral shoulder injuries [and] the payment of medical bills . . . ." <sup>1</sup>

Respondent argues all of claimant's shoulder diagnoses are unrelated to her work duties. Respondent argues Judge Hursh's order should be reversed to the extent he found claimant's adhesive capsulitis arose out of and in the course of her employment, in particular if her job duties were the prevailing factor in causing her injury, as well as timely notice. Respondent asserts Judge Hursh's rulings concerning medical treatment and medical expenses are not reviewable absent the judge exceeding his jurisdiction.

The issues raised on review are:

1. Did claimant's injuries arise out of and in the course of her employment?
2. Did claimant provide timely notice?
3. Did Judge Hursh exceed his jurisdiction by not ordering respondent to provide medical treatment or pay claimant's medical bills?

### FINDINGS OF FACT

Claimant works at respondent as a checker. She worked on a full-time basis until July 2010, but subsequently worked on a part-time basis, three shifts per week. She repetitively handled, moved, scanned, lifted and bagged lightweight items, such as a candy bar, up to heavier items, such as a 24-pack of water or a 50-pound bag of dog food. The cash registers were keypunch-operated until July 2011, at which time touchscreen monitors were installed. Claimant would scan and bag items the same way both before and after the change in registers, but the new monitors required her to key in merchandise or produce codes by pressing a monitor slightly above shoulder height.

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<sup>1</sup> Claimant's Brief at 6 (filed Nov. 16, 2012).

Claimant ordinarily got a break after working two hours on a register and would then be assigned to another register. On July 21, 2011, claimant was assigned to a register called the “widow-maker” that was the hardest register to work, apparently because it is nearest respondent’s grocery area, resulting in numerous customers and large orders. Claimant was assigned to the widow-maker for two hours, given a break, sent back to the widow maker, given a lunch break, and reassigned to the widow-maker. Claimant’s right shoulder and arm started bothering her and gradually worsened as the day progressed. She testified, “As I was working, my arm started bothering me. It started out just kind of aggravating, and as the day progressed it got worse and worse.”<sup>2</sup> Claimant denied any shoulder or arm problems prior to July 21, 2011.

Claimant testified she notified supervisors, Lacy and Melinda: “I just told them that my arm was bothering me because of being on this register for so long and I asked if I could be moved.”<sup>3</sup> Claimant was kept on the widow-maker after her initial request to be moved, but after additional complaints that her arm was bothering her really bad, she was assigned to working a left-handed express register. Claimant was later allowed to go home on July 21, 2011.

Claimant’s supervisors did not ask her to complete an accident report. Claimant’s supervisors did not ask claimant if she wanted to go to a doctor. Claimant did not tell her supervisors that she wanted to report a work injury on July 21, 2011, did not ask to fill out accident paperwork that day, did not explicitly tell management she was claiming a work injury and did not ask for medical treatment. Respondent never told claimant what to do in the event of a work injury or workers compensation case.

On her own, claimant went to her family physician, Dr. John Gollier, the Monday after July 21, 2011. Dr. Gollier administered a cortisone shot, set up therapy and made a referral to Christopher Eckland, D.O. Claimant did not alert respondent that she was receiving medical treatment. She kept doing her regular job and her condition worsened.

Dr. Eckland’s initial handwritten record dated September 8, 2011, noted claimant had right shoulder pain with no injury, but experienced pain using a new register at work for two or three months.<sup>4</sup> Dr. Eckland’s typed report noted claimant denied any specific injury and had increasing right shoulder pain for the prior two months. Right shoulder x-rays showed moderate AC joint arthritis. Dr. Eckland’s examination of claimant’s left shoulder was normal. Dr. Eckland diagnosed right shoulder rotator cuff tendinitis with early adhesive capsulitis. Dr. Eckland ordered physical therapy and restricted claimant from lifting with her right arm.

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<sup>2</sup> P.H. Trans. at 10.

<sup>3</sup> *Id.* at 43.

<sup>4</sup> *Id.*, Resp. Ex. B at 11. The handwritten number could be a two or a three.

Claimant gave respondent a copy of her September 8, 2011 restrictions. Respondent honored claimant's restrictions.

Claimant returned to Dr. Eckland on October 6, 2011. Claimant reported significant improvement in her pain, but she still lacked full right shoulder range of motion. Dr. Eckland continued claimant on the same restrictions. Respondent advised claimant it would not honor the restrictions unless she filed a workers compensation claim. Claimant testified respondent would not have known she was pursuing workers compensation benefits until after she turned in her October 6, 2011 restrictions.

On October 10 or 11, 2011, claimant signed an "Associate Statement" regarding her asserted injury. Such document indicated claimant injured her shoulder from operating a register in July, that she reported her injury to Clara Smith on October 4, 2011, and she did not report her injury immediately because she "[d]id not want to file workers comp."<sup>5</sup> Claimant agreed she did not want to file workers compensation.

Claimant testified respondent wanted to send her to Dr. Gollier for treatment under workers compensation, but she did not go to him because she had already seen him.

Dr. Eckland evaluated claimant on November 18, 2011. Claimant reported minimal pain and improved right shoulder range of motion. She reported that activities of daily living aggravated her shoulder pain. Dr. Eckland kept her on the same restrictions.

Claimant returned to Dr. Eckland on January 6, 2012. Claimant reported continued right shoulder pain. Dr. Eckland recommended a right shoulder MRI. Dr. Eckland's report stated, "She is in the current works of presenting this as a workman's [sic] comp injury. I did discuss with her that it was not until a fair bit after she started having pain that I was to evaluate her and she did not have any noted solitary injury."<sup>6</sup> Claimant had a right shoulder MRI on January 9, 2012.

Dr. Eckland's February 2, 2012 report noted claimant's right shoulder MRI revealed impingement findings, rotator cuff tendinitis and tendinitis of the long head of the biceps, without evidence of a definite tear. Dr. Eckland discussed various treatment options with claimant, including an injection, diagnostic arthroscopy and continued home therapy. Claimant opted to continue with home therapy and was to return to Dr. Eckland on an as needed basis. Claimant testified Dr. Eckland had nothing to offer and released her from treatment. She testified Dr. Eckland told her surgery could make her right shoulder worse.

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<sup>5</sup> *Id.*, Resp. Ex. C at 1.

<sup>6</sup> *Id.*, Resp. Ex. B at 2.

Edward Prostic, M.D., evaluated claimant at her attorney's request on March 19, 2012. Claimant reported working at a cash register that was higher than usual. Dr. Prostic opined claimant's repetitious reaching and lifting was the prevailing factor in causing right frozen shoulder and need for treatment. Potential treatment included "manipulation under anesthesia, continued stretching and strengthening exercises, or merely watchful waiting."<sup>7</sup>

Chris Fevurly, M.D., evaluated claimant on June 28, 2012, at respondent's request. Dr. Fevurly noted new registers were installed in July 2011. The old registers had keyboards at waist level; the new registers had a flat screen at eye level that required claimant to repetitively reach forward and slightly over shoulder level to touch the screen. Claimant would also have to scan products.

Dr. Fevurly assessed right shoulder pain with a working diagnosis of rotator cuff tendinopathy with impingement and clinical findings of adhesive capsulitis. Dr. Fevurly noted claimant had full left shoulder range of motion without any popping, clicking or crepitation. Dr. Fevurly's report did not mention left shoulder symptoms. Dr. Fevurly noted:

Adhesive capsulitis continues to be poorly understood in regards to causation and it is an entity that might be spontaneous and idiopathic, primary and/or caused by or secondary to injuries. Prolonged immobilization is a significant risk factor for development of that and pre-existing rotator cuff tendinopathy or surgeries also are predisposing medical conditions. Any factors that result in reduced range of motion is thought to be a risk factor for adhesive capsulitis and there is no quality evidence that work activities are a direct cause of adhesive capsulitis. It is to be noted that the job duties described by Ms. Barrett as reaching forward and slightly overhead are not recognized risk factors for development of adhesive capsulitis.

Impingement syndrome is produced by the development of a hooked acromion in the presence of thinning or wearing in the rotator cuff tendons. This is also very much age-related and is a very common syndrome in this aged patient. Rotator cuff tendinopathy and impingement develop over time and as result of the Activities of Daily Living and the work-related duties described, are not significant risk factors for development of impingement. However, her age, her gender and her body habitus are significant risk factors for development of impingement.

Based upon her description of her work duties and the working diagnosis of rotator cuff tendinopathy, impingement and adhesive capsulitis, the primary cause of this syndrome are not occupational and this is supported by the scientific literature.

At this point, she needs to decide whether she wants to let further time pass before pursuing other more aggressive interventions such as shoulder surgery or manipulation under anesthesia. If the most significant part of her discomfort is related to adhesive capsulitis, it is not always helpful to perform surgical intervention

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<sup>7</sup> *Id.*, Cl. Ex. 1 at 2.

to the right shoulder and usually giving this 2-3 years of time and a progressive stretching and strengthening program can return the range of motion in the right shoulder back to normal and reduce the pain as the 2-3 years natural history progresses.

At this point, she is able to perform modified duties and it would appear that she is slowly moving out of the employed arena as she has gone onto Social Security but has reduced her work hours to 20 hours. It is interesting to note that her right shoulder symptoms actually began just right around the time that she reduced her work hours from full-time to part-time. This reduction in work duties would be consistent with my opinion that occupational factors are not significant contributors or the primary reason for development of her current right shoulder pain from adhesive capsulitis.

Dr. Prostic evaluated claimant again on July 13, 2012. Claimant testified she returned to Dr. Prostic because her left shoulder was injured compensating for her right shoulder. She did not know when her left shoulder pain started. Dr. Prostic noted claimant had bilateral shoulder pain, diminished range of motion, weakness and significant pain “at the impinging position of each shoulder.”<sup>8</sup> Dr. Prostic noted “claimant has been having increasing difficulties of her left shoulder from favoring her right” and “appears to have rotator cuff tendinopathy of both shoulders.”<sup>9</sup> He suggested subacromial steroid injections, therapy and medication. Dr. Prostic opined claimant’s repetitive work was the prevailing factor in causing her injury, medical condition and need for medical treatment.

#### **PRINCIPLES OF LAW**

K.S.A. 2011 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant’s right to an award of compensation and to prove the various conditions on which the claimant’s right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(e) “Repetitive trauma” refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. “Repetitive trauma” shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

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<sup>8</sup> *Id.*, Cl. Ex. 1 at 4.

<sup>9</sup> *Id.*

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

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(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-520 states in part:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing. (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

An employer is liable to pay compensation where the employee incurs personal injury by repetitive trauma arising out of and in the course of employment.<sup>10</sup> The phrases “arising “out of” and “in the course of” employment have separate meanings; each condition must exist before compensation is allowable. “In the course of” employment relates to the time, place, and circumstances under which the accident occurred, and means the injury happened while the worker was at work in the employer’s service. “Out of” the employment points to the cause of the accident and requires a causal connection between the injury and the employment. An injury arises “out of” employment when it arises out of the nature, conditions, obligations and incidents of the employment.<sup>11</sup>

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is compensable.<sup>12</sup>

The Board's jurisdiction to review a preliminary hearing is limited to: (1) did claimant suffer injury by accident or repetitive trauma; (2) did the injury arise out of and in the course of claimant's employment; (3) did claimant provide proper notice; and (4) do certain defenses apply.<sup>13</sup> The Board has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded his or her jurisdiction.<sup>14</sup>

### ANALYSIS

#### **Did claimant’s injuries arise out of and in the course of her employment?**

Drs. Eckland, Prostic and Fevurly agree claimant has right shoulder adhesive capsulitis and right shoulder rotator cuff tendinitis. The parties dispute whether claimant’s repetitive work caused these diagnoses and if her work was the prevailing factor in her diagnoses and her need for medical treatment.

Dr. Eckland’s September 8, 2011 typed report noted claimant denied any specific injuries. His January 6, 2012 report indicated claimant did not initially tell him about any “noted solitary injury” and she waited until January 2012 to tell him she was pursuing workers compensation. These reports are of little evidentiary value in terms of proving claimant did not get hurt at work because Dr. Eckland’s handwritten September 8, 2011 report states claimant’s right shoulder became painful when using a new register at work.

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<sup>10</sup> K.S.A. 2011 Supp. 44-501b(b).

<sup>11</sup> See *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197-98, 689 P. 2d 837 (1984).

<sup>12</sup> *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶ 2, 128 P.3d 430 (2006).

<sup>13</sup> K.S.A. 2011 Supp. 44-534a(a)(2).

<sup>14</sup> K.S.A. 2010 Supp. 44-551(i)(2)(A).

Dr. Fevurly noted the primary causes of claimant's shoulder diagnoses were not occupational. He noted claimant reaching forward and slightly overhead to use a monitor would not be a risk factor in developing adhesive capsulitis. Dr. Fevurly's main focus on claimant's use of a monitor is faulty, as claimant alleged injury from scanning, lifting and bagging items, in addition to using a monitor. Dr. Prostic opined claimant's repetitive work was the prevailing factor in causing her shoulder injuries and need for medical treatment.

This Board Member concludes claimant's right shoulder adhesive capsulitis and right rotator cuff tendinitis injuries were due to her repetitive work of scanning, lifting and bagging items, in addition to using a monitor. This Board Member further finds claimant's repetitive work was the prevailing factor in causing such injuries and her associated need for medical treatment.

Regarding her left shoulder, this Board Member finds it is problematic that claimant did not know when her symptoms began. It is also curious why she made no left shoulder complaints during the five months she treated with Dr. Eckland, or when she initially saw Dr. Prostic or to Dr. Fevurly. Her left shoulder symptoms were first noted by Dr. Prostic about two weeks after Dr. Fevurly's evaluation.

Still, claimant testified without contradiction that her left shoulder symptoms developed from favoring her injured right shoulder. "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."<sup>15</sup> Claimant's testimony is not perfect, and the timing of her left shoulder complaints raises some questions, but her testimony that she injured her left shoulder over time from compensating for her injured right shoulder is not improbable or untrustworthy. Her testimony establishes her left shoulder rotator cuff tendinitis was the direct and natural result of favoring her right shoulder. Therefore, claimant's repetitive work activity was the prevailing factor in her right frozen shoulder/adhesive capsulitis and her right and left rotator cuff tendinitis injuries, as well as her need for medical treatment.

Judge Hursh found claimant's frozen shoulder and rotator cuff tendinitis were separate injuries and that Dr. Prostic attributed claimant's shoulder tendinitis to repetitive trauma unrelated to her right frozen shoulder. This Board Member does not read Dr. Prostic's second report as such or view claimant's adhesive capsulitis and right rotator cuff tendinitis in isolation. While Dr. Prostic initially diagnosed right frozen shoulder and later diagnosed bilateral rotator cuff tendinopathy, both diagnoses were present from the start of Dr. Eckland's treatment, at least for the right shoulder. Dr. Prostic did not devise a new diagnosis of rotator cuff tendinitis. To the extent Judge Hursh did not find claimant's bilateral rotator cuff tendinitis compensable, his preliminary hearing Order is reversed.

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<sup>15</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146, syl. ¶ 2 (1976).

**Did claimant prove notice?**

Judge Hursh ruled claimant provided notice for her injury by repetitive trauma on July 21, 2011. Judge Hursh's preliminary hearing Order does not list a date of injury by repetitive trauma. Claimant needed to provide notice within 20 days from seeking medical treatment for her injury by repetitive trauma<sup>16</sup> or 30 days from the date of injury by repetitive trauma, whichever came first. Whether notice provided by claimant was timely depends on the date of injury by repetitive trauma, which is a legal fiction.<sup>17</sup>

The date of injury by repetitive trauma is based on the earliest of several triggering events listed in K.S.A. 2011 Supp. 44-508(e), as noted above on page seven. The first two considerations for an injury date are based on when a claimant is taken off work or provided modified or restricted duties due to diagnosed repetitive trauma. Claimant was given restrictions by Dr. Eckland on September 8, 2011. However, Dr. Eckland did not provide the restrictions based on *diagnosed repetitive trauma*. Therefore, a date of repetitive injury based on a physician imposing of restrictions for diagnosed repetitive trauma does not apply to this case.

Another possible injury date is when a physician first told claimant her condition was work-related. Dr. Eckland never indicated claimant's injury was work related. Dr. Prostic's March 19, 2012 report notes claimant's condition was work related. Dr. Prostic appears to be the first physician to advise claimant her condition was work related. Therefore, claimant's date of injury by repetitive trauma was when Dr. Prostic advised her that her condition was work-related. Claimant may have been provided such information at Dr. Prostic's appointment, but that is not clear from the evidentiary record. Claimant's attorney apparently received Dr. Prostic's March 19, 2012 report on March 20, 2012, at least based on the "received" stamp on the report. Claimant's date of injury by repetitive trauma was either March 19 or March 20, 2012.

Claimant testified she told her supervisors on July 21, 2011 that her right arm was bothering her due to using the "widow-maker" register and she wanted to be moved to easier duties. The notice statute requires claimant either make it clear she is claiming benefits under the workers compensation act or suffered a work-related injury. It is true respondent did not know claimant was asserting entitlement to benefits under the KWCA until early-October, 2011. However, claimant satisfied notice when she told her supervisors that her work duties caused her to be injured.

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<sup>16</sup> The Appeals Board has interpreted the 20 days notice requirement as 20 days from the date claimant sought medical treatment for the repetitive trauma injury after the date of injury by repetitive trauma has been established under K.S.A. 2011 Supp. 44-508(e). See *Shields v. Mid Continental Restoration*, No. 1,059,870, 2012 WL 4763702 (Kan. WCAB Sep. 19, 2012).

<sup>17</sup> *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

Notice on July 21, 2011 was roughly eight months prior to claimant's legal date of injury by repetitive trauma. Notice can be provided before a legal date of injury by repetitive trauma.<sup>18</sup> The notice statute does not require notice of injury after the legal date of injury, when claimant has already provided notice during the pendency of the series of microtraumas. Moreover, respondent had actual knowledge of the injury before the legal date of injury, so even if claimant was required to give notice after her legal date of injury, such requirement was waived based on prior actual notice.

The Associate Statement signed by claimant, which indicates her injury occurred in July, is not legally indicative of when her injury occurred. Rather, the criteria for establishing a date of injury by repetitive trauma are set forth in K.S.A. 44-508(e). Moreover, while the Associate Statement indicates claimant reported her injury on October 4, 2011, notice provided on such date would still be timely under the Board's analysis that notice may be satisfied before the legal date of injury by repetitive trauma.

### **Did Judge Hursh's order concerning medical treatment and bills exceed his jurisdiction?**

Judge Hursh ordered no treatment for adhesive capsulitis and claimant's medical treatment was unauthorized. The only medical bills in evidence were Dr. Prostic's charges. These issues concern medical treatment. Judge Hursh did not exceed his jurisdiction by determining whether claimant currently needs medical treatment, whether medical bills should be paid or if treatment was unauthorized. The medical issues raised are not jurisdictional and are not subject to review at this stage of the proceedings.

As noted above, this Board Member finds claimant has compensable bilateral rotator cuff tendinitis. The claim is remanded to Judge Hursh to determine, in his discretion, if claimant is entitled to medical treatment for such condition.

### **CONCLUSION**

The undersigned Board Member finds: (1) claimant's injury by repetitive trauma occurred on March 19 or 20, 2012; (2) she proved compensable right shoulder adhesive capsulitis/frozen shoulder and bilateral shoulder rotator cuff tendinitis; (3) she proved timely notice; and (4) the matter is remanded to Judge Hursh regarding whether claimant is entitled to right shoulder rotator cuff tendinitis treatment.

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<sup>18</sup> *Whisenand v. Standard Motor Products*, No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012); see also the application of the predecessor statute in *Hunt v. Integrated Solutions, Inc.*, No. 1,046,939, 2010 WL 1918584 (Kan. WCAB Apr. 14, 2010) ("Admittedly, it seems unusual to conclude an injured employee gave notice of an accident that had yet to occur. Yet, that is a function of the legal fiction that results in cases of microtraumas and the terms of K.S.A. 44-508(d).").

The above preliminary hearing findings and conclusions are neither final nor binding as may be modified upon a full hearing.<sup>19</sup> This review of a preliminary hearing Order was determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to review by the entire Board when the appeal is from a final order.<sup>20</sup>

**WHEREFORE**, the undersigned Board Member finds Judge Hursh's preliminary hearing Order is affirmed in part, reversed in part, and remanded for his consideration of claimant's request for medical treatment for bilateral rotator cuff tendinitis.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2012.

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HONORABLE JOHN F. CARPINELLI  
BOARD MEMBER

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<sup>19</sup> K.S.A. 44-534a.

<sup>20</sup> K.S.A. 2011 Supp. 44-555c(k).